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Parley Mortenson and Edith Mortenson, His Wife, Roy Mortenson and Vera Mortenson, His Wife v. Financial Growth, Inc., Professional United Realty, Floyd E. Benton and Glen R. Milner : Respondents' Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

PARLEY MORTENSON and EDITH MORTENSON, his wife, ROY MORTENSON and VERA MORTENSON, his wife,

Plaintiffs and Respondents,

vs.

FINANCIAL GROWTH, INC., PROFESSIONAL UNITED REALTY, FLOYD E. BENTON and GLEN R. MILNER,

Defendants and Appellants.

Case No. 11848

RESPONDENTS' BRIEF

Appeal from a Summary Judgment of the Third District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

PARLEY MORTENSON and EDITH MORTENSON, his wife, ROY MORTENSON and VERA MORTENSON, his wife,

Plaintiffs and Respondents,

vs.

FINANCIAL GROWTH, INC., PROFESSIONAL UNITED REALTY, FLOYD E. BENTON and GLEN R. MILNER,

Defendants and Appellants.

Case No. 11343

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This is a suit for a judgment declaring that the defendant, Financial Growth, Inc. had breached a agreement for the installment sale of real property and that the plaintiffs have the right to terminate such agreement.

DISPOSITION IN LOWER COURT

The trial court granted the plaintiffs' motion for a summary judgment declaring that the agreement had been breached, and that the plaintiffs have a right to terminate it, and dismissing the defendants' counterclaim.

RELIEF SOUGHT ON APPEAL

The respondents seek affirmance of the declaratory judgment.

STATEMENT OF FACTS

The appellants' statement of facts is confusing, is not based upon or referenced to the record and is not confined to the issues before the trial court and before this court. The respondents submit the following statement.

The respondents, hereinafter referred to as the "Sellers" and the appellant, Financial Growth, Inc., hereinafter referred to as the "Buyer," entered into an agreement dated August 25, 1967, (R. 4-42) for the sale of real property in Morgan County, Utah, which included some 14,000 acres of land, a home, grazing rights and water rights. The sales price was $537,000.00, to be adjusted up or down depending on the actual acreage after a title search (R. 6). The contract pro-

vides for payment of $3,000.00 earnest money upon execution of the agreement and $152,730.00 on December 1, 1967 "(or an adjusted amount as a result of acreage adjustment as above provided)." The principal balance is to be paid in five years in installments of $76,254.00 each year with 5% interest on the deferred amount from December 1, 1967. There is a provision for adjustment of the amount of the annual payments due to acreage adjustments. (R. 6, 7) There is a provision for land release. We quote:

> "**RELEASE**: Buyer will not receive any land nor land release credit for the $155,730 payment; however, thereafter, for each dollar of principal reduction made and on condition that the Buyer is not in default, Buyer, on request, may have property in mutually satisfactory parcels consistent with the following: . . ." (There follows detailed provisions regarding such parcels. (R. 8-10)
>
> "**SALES COMMISSION**: The sales commission is to be paid by the Buyer in accordance with the agreement between the Buyer and Professional United Realty and its broker, Glen R. Milner and agent, Floyd E. Benton. The sales commission is Twenty-Eight Thousand Two Hundred and Sixty-Five Dollars ($28,265.00). Seller is to pay no real estate sales commission whatsoever and Floyd E. Benton waives any and all claims he may have against the Sellers or any of them arising out of this transaction or any prior listing agreement in connection with the sale of the Mortenson property." (R. 10, 11)

The agreement provides that the possession date is December 1, 1967. As to the conveyance the agreement provides:

> "DEED: The deed or deeds shall be good and sufficient warranty deed or deeds and shall be in proper form for recording and shall be duly executed and acknowledged by Sellers so as to convey to Purchaser the fee simple title to said property free and clear of all liens and encumbrances except as stated in this Agreement. The deed shall be delivered with the necessary United States Documentary stamps attached thereto upon receipt of the payments provided herein." (R. 11, 12)

The following significant provision relates to the nature of the title to be conveyed, to liens and encumbrances and to proof of title.

> "CURE OF ENCUMBERANCES AND LIENS: If Seller shall be unable to deliver or cause to be delivered a deed or deeds conveying the fee simple title to the property, free of all liens and encumbrances except as herein stated, and if Purchaser shall not exercise the privilege (which Purchaser shall have) of waiving the liens and encumbrances which shall be the basis of such inability and accept the title in its then condition without diminution of the purchase price and without claim or demand against Seller, then the aforesaid payments made by Purchaser to Seller, shall be refunded without interest to Purchaser, and each and all of the other obligations of the parties hereto under this Agreement shall thereupon cease, except that Seller may, if it so elects, have the privilege and

option to adjourn the time for delivery of the deed for a period or periods not exceeding in the aggregate ninety (90) days in order to afford Seller an opportunity to cure or remove any lien or encumbrance which shall be the basis of such inability, Purchaser's obligations under this Agreement meanwhile to remain in full force and effect contingent upon such curing or removal within such time." (R. 12-13)

"ABSTRACT OR TITLE INSURANCE: Seller agrees to furnish an abstract brought to date, or at Seller's option, a policy of title insurance in the name of the Purchaser." (R. 15)

The complaint filed January 17, 1968, alleges the making of the agreement, the provision for payment of $152,730.00 on December 1, 1967, and the failure of the Buyer to pay. It is further alleged that the Sellers have good and sufficient title as disclosed by abstracts delivered to the Buyer's agent in 1966, that $259.00 had been spent by the Sellers for a preliminary title search, that the search showed that the Sellers had more than sufficient acreage to perform the contract, that Sellers had informed Buyer's counsel that legal descriptions were available for examination and that "if monies were placed in escrow to cover the December 1, 1967, installment payment the Sellers would procure title insurance." That an iterim title insurance binder commitment has been delivered to the Buyer and "no payment nor escrow deposit has been made relative to the December 1, 1967 payment." The prayer is for a judgment determining that the agreement has been

breached and that the Sellers have a right to terminate the agreement. The second paragraph prays for the recovery of costs and disbursements, $259.00 for the title search and for a reasonable attorneys fee. (R. 2, 3)

The answer of the Buyer and Professional United Realty hereinafter referred to as the "Broker" denies the allegation that the agreement was breached by the Buyer, denies that the Seller has "good and sufficient title," denies that Floyd E. Benton had been requested to return abstracts, denies for lack of information the cost of the title search and denies that it cost $259.00. Such defendants admit that "there may be sufficient acreage to perform said contract but allege that this in and of itself is not sufficient to constitute compliance by plaintiffs." The defendants admit all other allegations of the complaint. (R. 43, 44).

For an affirmative defense it is alleged that the Buyers have at all times stood ready to perform upon the condition that the Sellers would "guarantee and provide good and sufficient fee simple title to said property," and that the Sellers do not own the fee simple title because of the "reservation of certain mineral rights."

The counterclaim is for the recovery of a real estate commission based on an attached farm listing dated February 26, 1966, for the sale of 13,890 acres for $582,300.00 (much of which is illegible) and an earnest money receipt and agreement dated April 25,

1966, for the sale of 13,280 acres for $582,300.00 to Beehive Development Co., Inc. There is no allegation that this earnest money agreement was executed by the Sellers nor ever resulted in a sale. The contrary must be assumed because it is alleged "subsequently, the defendant Professional United Realty was able to obtain an offer to purchase said property from Financial Growth, Inc., a Hawaiian corporation, authorized to do business in Utah. Pursuant to the last mentioned offer to purchase the sales agreement appended to the complaint was executed by the parties."

The counterclaim further alleges that Financial Growth has stood ready to perform but has been prevented from doing so by the misrepresentations of the Seller as to the mineral rights and further that the Sellers further delayed "the conclusion of this transaction by failing to acquire timely interest in certain acreage involved and failing to certify such acquisition to the Defendants." "The Defendants are entitled to a commission of $58,000.00" which has been "reduced to $28,000.00 by subsequent oral agreement of the parties." The prayer is for judgment against the Sellers and in favor of the Broker, Professional United Realty. (R. 44, 45).

The Sellers replied admitting the execution of the farming listing by Parley Mortenson only, admitting there was an offer to purchase dated April 25, 1966, admitted the execution of the agreement attached to the complaint, and admitted that in some patents from the

United States and the State of Utah oil, gas, coal and other mineral rights are reserved. It is alleged that the Buyers had actual or constructive notice of the reservations. The other allegations in the counterclaim are denied. (R. 55, 56)

The Buyers filed a motion for a summary judgment worded as follows:

> "Come now the plaintiffs above named and move the above entitled court for an order granting to the plaintiffs a summary judgment against the defendants and each of them declaring that the real estate contract described in the complaint has been breached by the defendant, Financial Growth, Inc., and that the plaintiffs have a right to terminate said agreement. Plaintiffs further pray for a summary judgment dismissing the counter-claim of the defendants, Financial Growth, Inc. and Professional United Realty.
>
> This motion is made upon the ground that there is no genuine issue of fact between the plaintiffs and any of the defendants.
>
> This motion is based upon the files and records herein and upon the affidavit of Parley Mortenson attached hereto and made a part hereof." (R. 57)

The affidavit of Parley Mortenson states that demand was made on the Buyer for payment of the installment due December 1, 1967, in the amount of $152,730.00 and it was refused and that no payment has been made except $3,000.00 paid about the date of

execution of the agreement. It is further stated that the Seller has at all times been and now is ready, able and willing to perform all obligations of the Seller as and when they become due. (R. 59, 60).

The affidavit of Floyd E. Benton in behalf of Professional United Realty, Inc. states that the farm listing agreement was executed by one of the plaintiffs, that an offer to purchase was obtained from Beehive Development Co., that said Buyer was ready, able and willing to perform according to the offer to sell but that said sale was not consumated through no fault of the Broker. It recites that subsequently the Broker had obtained a second offer to purchase the same property from Financial Growth, Inc. (the Buyer) who was ready, willing and able to perform. That the Broker has earned and is entitled to receive a commission notwithstanding any difficulty which may have arisen between the Seller and the Buyer.

It should be noted that a man named Perry Holley signed the Earnest Money Receipt and Offer to Purchase in behalf of Beehive Development Co., Inc. as "president," (R. 47) and also the agreement dated August 25, 1967, for Financial Growth, Inc. as "agent and advisor." (R. 16).

The trial court made an order granting the motion for summary judgment which reads as follows:

> "The plaintiffs' Motion for Summary Judgment having come on regularly for hearing before the above entitled court on May 3, 1968,

and on June 27, 1968, the court having heard argument of counsel and being fully advised in the premises, and good cause appearing therefor,

IT IS ORDERED that the plaintiffs' Motion for Summary Judgment be and it is hereby granted." (R. 65).

STATEMENT OF POINTS

1. The judgment declaring a breach of contract and a right to termination is fully supported by the record and the law.

2. The counterclaim was properly dismissed.

ARGUMENT

1. THE JUDGMENT DECLARING A BREACH OF CONTRACT AND A RIGHT TO TERMINATION IS FULLY SUPPORTED BY THE RECORD AND THE LAW.

It will be noted that Rule 56 (a) permits the plaintiff to file a motion for a summary judgment in his favor "upon all or any part of a claim."

Rule 56 (c) so far as pertinent here provides:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

In the case of *Bullock* v. *Deseret Dodge Truck Center*, 11 Utah 2d. 1, 354 P.2d. 559 after referring to the words of the rule stated above the court said:

> "Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. . . ."

It will be noted that the Sellers filed their motion for the following relief: (1) a declaration that the Buyer had breached the agreement, (2) that the Sellers have a right to terminate it, and (3) dismissal of the counterclaim. We will confine our argument to the issues presented by the motion for summary judgment.

The agreement, under the heading "Payment" required the Buyer to pay to the Seller $152,730.00 on **December 1, 1967. (R. 7)**. It is not denied in the answer that the payment was not made (R. 43) and the statement in the affidavit of Parley Mortenson attached to the motion for summary judgment that the payment had not been made (R. 59) is not controverted in the only counter affidavit filed by any defendant. (R. 63, 64). The failure to make the initial payment must therefore be considered admitted. By inference, the failure to pay is admitted in appellants' brief, p. 11.

The Buyer's sole excuse for failure to pay is that some of the land was subject to mineral reservations. See Answer (R. 44) and Counterclaim (R. 45).

In the case of *Woodard* v. *Allen*, 1 Utah 2d, 220, 265 P.2d 398, this court had before it a similar situation.

The plaintiff and defendant made an agreement for the sale of property and the defendant delivered a check for $500.00 as a down payment and agreed to pay an additional $27,000.00 in one month. The defendant made several objections to the agreement and stopped payment on his check. The plaintiff sued. In his amended answer the defendant questioned the marketability of the plaintiff's title. This court held:

> " . . . Defendant's attack on the marketability of plaintiff's title was premature, since, under the authorities, that fact is determinable, not as of the date of execution of the contract, but as of the time a vendee tenders that which, under the contract, would require the vendor to transfer not only marketable title, but the title which the latter agreed to convey.
>
> Here the defendant reneged in 24 hours, a month before the second payment was due, and 5 years before the plaintiffs could demand final payment, neither tendering nor evidencing an inclination to pay any further sum under the contract. Under these facts, plaintiffs were not obliged to prove marketable title simply because defendant raised the point. . . . "

There is nothing in the record in the present case which would require the Seller to transfer a marketable title or would entitle the Buyer to raise a question on the reserved mineral rights or to raise any other title question until the Seller was obligated to deliver a deed. Under the heading "Release" (R. 8) the agreement is crystal clear that the Buyer is not entitled to a deed to any land upon payment of the first $155,730.00 which

amount is the $3,000.00 payment plus the payment of $152,730.00 due on December 1, 1967.

For other cases holding that the Buyer's excuse for non payment of the installment is without merit see:

Naylor v. *Jolley*, 100 Utah 130, 111 P.2d. 142.

Coughran v. *Bigelow* (Utah), 164 U.S. 301, 41 L. Ed. 442.

92 C.J.S. p. 83.

It will be noted that in the affidavit of Parley Mortenson attached to the motion for a summary judgment it is stated that the Seller made demand on the purchaser for payment of the December 1, 1967 installment in the amount of $152,730.00 *and payment was refused*. The affidavit is dated April 26, 1968. (R. 59) The facts stated therein are not disputed.

It is the law that a refusal by the buyer to perform an executory contract of sale of land warrants a termination.

91 C.J.S. 1071.

Under elementary rules of contract law the Seller has a right to terminate an executory contract because of the substantial non-performance or breach of the Buyer.

17A C.J.S. p. 516.

The question as to what constitutes a substantial breach depends upon the peculiar circumstances of each

case. It is said that a breach must go to the root of the contract.

17A C.J.S. pp. 518, 519.

Williston discusses and states the rule as follows:

> "Nevertheless there are many cases where the injured party is content merely to terminate his legal relations with the other party to the contract without more. That he may do this seems clearly established both in England and in the United States. . . . This right may become of great importance if the contract while it exists, operates as a threatened liability or a cloud on title." 5 Williston on Contracts pp. 4100, 4101. Res Contracts, Sec. 410.

> "In truth rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract." 5 Williston on Contracts, Rev. Ed. p. 4106.

The answer does not allege that the Buyer has tendered the first installment payment or is ready, willing or able to perform in accordance with the contract, nor is it stated in any pleading nor is it argued that there was not a repudiation of the agreement by the Buyer.

The payment of $152,730.00 at the time possession is to be delivered certainly goes to the root of the con-

tract within the meaning of the rules quoted above, and would certainly constitute a defense to an action filed by party in default within the meaning of the rule stated by Williston.

The failure of the Buyer to pay the first installment under the circumstances set out in the contract entitles the Seller to terminate the contract. The important circumstances in addition to non-payment on the due date which justify termination include the following:

(a) The refusal of the Buyer to pay based on the usual reservations in land patents of oil and minerals. (R. 44, 56)

(b) The large purchase price $537,000.00 and the small down payment, or as it is referred to in the agreement, "earnest money." (R. 6)

(c) The provision that possession was to be delivered on December 1, 1967. (R. 11)

(d) The agreement that the Sellers would attempt to sell their livestock before December 1, 1967. (R. 11)

(e) The requirement that the winter range be leased if the livestock are not sold by December 1, 1967. (R. 11)

(f) The requirement that the livestock be removed from the real property by December 1, 1968. (R. 11)

(g) The fact that the ranch property was a home

for livestock which fluctuate in price and are perishable. (R. 11)

(h) The agreement does not require the conveyance of the oil and mineral rights with the land but requires only that title be conveyed free of all liens and encumbrances. (R. 12) The excuse based on reservations of oil and mineral rights was an afterthought to justify non-payment of the installment.

> "The fact that time is of the essence of a contract may appear from the nature of the property or the objects which the parties had in view." 91 C.J.S. p. 1004.

The circumstances set out above show that time of payment is of the essence of the contract.

The Buyer contends that the motion for summary judgment should not have been granted because the pleadings present "bona fide issues of material facts," as follows:

(1) The issue as to whether the Sellers had good and sufficient title. (App. Br. 6).

(2) Who should pay the costs and disbursements. (App. Br. 7, 8).

(3) Whether or not Parley Mortenson was a partner. (App. Br. 8).

(4) Whether the real estate broker had obtained a buyer ready, willing and able to perform. (App. Br. 8).

(5) Whether the Sellers failed to obtain a timely interest in certain acreage involved. (App. Br. 8).

In view of the fact that the motion for summary judgment is confined to the issues as to whether there was a breach of contract, the right of the Sellers to terminate and the dismissal of the counterclaim, the issues numbered (1), (2), (3), and (5) had no importance in the trial court nor before this Court. Further, as to the issue regarding the obligation of the Buyer to pay certain title costs of $259.00, that is not of any importance in the consideration of the issues raised by the motion. The claim in the appellants' brief pp. 17-19 that the trial court should have ordered the refund to the Buyer of the $3,000.00 paid on the agreement was not pleaded, was not argued in the trial court and was for the first time argued on appeal. It is also a matter which is not within the issues raised by the motion.

The issue (3) regarding the counterclaim is discussed under the next heading.

2. THE COUNTERCLAIM WAS PROPERLY DISMISSED.

The counterclaim of Professional United Realty for $28,000.00 is based upon a farm listing agreement dated February 26, 1966. It does not mention Professional United Realty but is accepted by Floyd E. Benton. It is a listing for six months. The earnest money offer from Beehive Development Co. dated April 25,

1966, was not accepted. It is plainly inferred in paragraph 2 of the counterclaim that this offer was abandoned in favor of the offer of Financial Growth, Inc. It is significant that one Perry Holley signed as president of Beehive and as "agent and advisor" of Financial Growth, Inc. (R. 16 and 47). The first offer never having been accepted, the agreement with Financial Growth, Inc. being dated about one year after the Floyd E. Benton listing expired, and there being no listing with Professional United Realty or any assignment from Benton to the counterclaimant, it is obvious that the counterclaim was properly dismissed.

Also, it should be noted that the agreement in suit upon which the counterclaim for commission was based provides on pp. 10 and 11 as follows:

> "**SALES COMMISSION**: The sales commission is to be paid by the Buyer in accordance with the Agreement between Buyer and Professional United Realty and its broker, Glen R. Milner, and agent, Floyd E. Benton. The sales commission is Twenty-Eight Thousand Two Hundred and Sixty-Five Dollars ($28,265.00). Seller is to pay no real estate sales commission whatsoever and Floyd E. Benton waives any and all claims he may have against the Sellers or any of them arising out of this transaction or any prior listing agreement in connection with the sale of the Mortenson property."

There is no pleading or statement by affidavit that the agreement between the Buyer and the real estate broker did not exist or should be disregarded. It is con-

clusive that the Broker agreed to take its commission from the Buyer and expressly waived any claim against the Seller. Floyd E. Benton is referred to in the complaint as "purchasers agent," (R. 2) and this is not denied in the answer. (R. 43). The fact that Professional United Realty did not sign the agreement which it is claimed is the fruit of its labor has no significance in view of the foregoing facts.

CONCLUSION

The motion for summary judgment confined as it was to the issues of breach of the agreement dated August 25, 1967, the right of the Sellers to terminate such agreement, and the dismissal of the counterclaim was properly granted because there were no genuine issues of fact as to such matters raised by the pleadings or controverted by affidavit. The plaintiffs were as a matter of law entitled to the relief granted.

Respectfully Submitted,

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